7-27-78

STAT [redacted]

None of this has been disseminated so please hold closely.

Metzenbaum is agreeable to the invocation of the 7-day rule. I'm off to the Committee meeting. Will talk to you this afternoon.

[redacted] STAT

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ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

JUL 26 1978

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Department of Justice is pleased that the Subcommittee on Citizens and Shareholders Rights and Remedies has approved for full Committee action S. 3314, the Tort Claims Act amendments bill. As you know, we have been working with the staffs of both Senator Metzenbaum's Subcommittee and the Subcommittee on Administrative Practice and Procedure to draft what this Department believes are badly needed amendments to the Federal Tort Claims Act. S. 3314, however, contains several provisions which this Department finds objectionable.

First, as section 6 of the bill would amend 28 U.S.C. 2679(b), constitutional tort claimants could ignore the bill's provisions and proceed individually against a former employee or Presidential appointee. In other words, a claimant who alleges that a constitutional tort was committed by a former employee or Presidential appointee could elect to proceed either under existing law against the individual employee or against the Government under the bill's amendments. If the claimant elects to proceed against the Government, he could still initiate and participate in a discipline proceeding against the employee under the provisions of proposed 5 U.S.C. 7804, as added by section 13 of the bill.

former employee

We believe that a Federal employee receives no protection from the threat of lawsuits - one of the main purposes of the bill - if that immunity is removed the day he leaves Government service. Moreover, removing the immunity for former employees provides an attractive incentive for culpable employees to remain with the Government. At the moment most constitutional tort type lawsuits appear to be directed at Presidential appointees. These Government officials are just as worthy of the protection from the threat of harassing lawsuits as other Federal employees.

Finally, the so-called "election" can be easily circumvented in situations involving multiple plaintiffs. One plaintiff could move against the former employee or Presidential appointee individually, the other plaintiff could recover against the Government and then obtain an investigation into the employee's conduct and a public report under the provisions proposed of 5 U.S.C. 7804.

Our second objection to S. 3314 also concerns proposed section 2679(b), which provides that for the Government to be exclusively liable, the employee must have been acting "within the scope of his authority or with a reasonable good faith belief in the lawfulness of his conduct." We believe that this language unduly restricts employee immunity. "Scope of authority" is a term not often used in Federal tort litigation. Furthermore, one can postulate situations, such as a Federal employee enforces a state criminal statute at the scene of a crime in violation of self-serving agency regulations, in which a worthy employee may not strictly be acting in good faith. This Department recommends that the Committee require that the employee be acting "within the scope of his office or employment"--language which is much more common in Federal tort litigation and which will better insure that Federal employees can act decisively without the threat of harassing lawsuits. Moreover, we note that section 7 of the bill, which amends 28 U.S.C. 2679(d) provides that for constitutional torts, the Attorney General may certify that current employees were acting within scope of authority or with a reasonable good faith belief in the lawfulness of their conduct. However, there is no provision for certifying the conduct of former employees or Presidential appointees.

Scope of employment

Thirdly, the Department of Justice opposes the exposure of the United States to punitive damages. The retroactivity provision, section 12 of the bill, would authorize plaintiffs with pending suits and claims to elect to retain their right to demand a jury trial or to request punitive damages. A plaintiff electing to retain his right to trial to a jury and to request punitive damages would not be able to avail himself of the bill's provisions relating to liquidated damages, waiver of absolute or qualified immunity, or attorneys fees.

We believe that although a plaintiff with a pending claim may have a constitutional right to maintain his request for a jury trial, no such right applies to punitive

damages. The long standing policy of not allowing punitive damages to run against the United States should not be breached in this bill.

Fourthly, we have one serious concern about section 13 of the bill which creates a right for the victim of a constitutional tort to initiate and to participate in an agency discipline proceeding against the offending employee. Most importantly, proposed section 5 U.S.C. 7803(c) would authorize the administrative body reviewing the agency discipline proceeding to "substitute its judgment as to the appropriate nature and degree of disciplinary action." The Department of Justice feels most strongly that such a substitution-of-judgment standard of administrative review is unwise. If we are serious about requiring agencies to discipline employees responsible for constitutional torts, then we should not allow the agency proceeding to become a sham or meaningless exercise that can be completely ignored on appeal. Moreover, a substitution-of-judgment standard of administrative review is unsound as a matter of procedure. No reviewing body should be allowed to substitute its judgment for that of the fact-finder on the basis of a cold record. Although the reviewing administrative body would be able to supplement the record, it could only do so after examining a transcript of the proceeding below. Certainly the judgment of the officer or body who heard the witnesses testify and be cross-examined should be worth something and should only be overturned on appeal if that judgment was unreasonable. We recommend that proposed section 7903(c) be amended to provide that the administrative review should be to determine whether or not the action taken by the agency below was reasonable.

Finally, concerning proposed 5 U.S.C. 7806, we believe that the Attorney General should be able to approve the discipline proceeding regulations promulgated by the Civil Service Commission. Certainly, the Government's chief law enforcement officer should be able to approve the regulations which would be applicable to all Federal law enforcement employees.

S. 3314 is badly needed legislation which should be enacted by the Ninety-fifth Congress. The changes discussed above will enable this Department to unqualifyingly and enthusiastically support the bill.

Sincerely,

Patricia M. Wald

Patricia M. Wald
Assistant Attorney General